

1-2019

Commentary: Back to the Future

James Nisbet

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>

Part of the [Intellectual Property Law Commons](#), and the [Other History of Art, Architecture, and Archaeology Commons](#)

Recommended Citation

James Nisbet, *Commentary: Back to the Future*, 9 U.C. IRVINE L. REV. 455 (2019).

Available at: <https://scholarship.law.uci.edu/ucilr/vol9/iss2/9>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

Back to the Future

James Nisbet*

Reading Jessica Silbey's *Justifying Copyright in the Age of Digital Production* from my position as a scholar of modern and contemporary art history is an uncanny experience that stems from multiple aspects of the argument. First, despite the impressive training, years of specialized practice, and professional success among the commercial and studio photographers whom she interviewed, these by and large are not the group of photographic practitioners addressed by either contemporary art criticism or art historical scholarship. Since the advent of Marcel Duchamp's readymade in the early twentieth century and the traction gained by a conceptualist approach to artistic production following the 1960s that has privileged the ideation of artworks over manual skill, the kind of photographic production most important to contemporary art criticism and history eschews precisely the kind of abilities valued by the majority of photographers discussed in Silbey's article. In other words, the body of work produced by these photographers does not exist entirely outside the mainstream of the art world, but is decidedly on its fringes.

Second, from the personal point of view of a scholar in the humanities today, there is sense of being thrust into conversations of the late twentieth century, rather than the twenty-first, in Silbey's argument. I completed my own doctoral studies at a time during which the humanities at large had transitioned from the hot-house of theory associated with late twentieth-century postmodernism and the American reception of critical theory to a more decidedly historiographic and epistemologically grounded approach. Thus, it is intriguing that the issues of reproducibility and narrative theory cited by Silbey—comprising notable authors such as Walter Benjamin and Hayden White—arise primarily from that previous period and paradigm. This, however, is not unique to her contribution to “The Discursive Turn in Copyright” conference. From reader-response theory to Jacques Derrida's aesthetic theory to Mikhail Bakhtin's poetics, the core thinkers and ideas cited in a number of the papers delivered at the conference (now revised and collected in the present volume) offer something like a time warp for scholars in the humanities, taking us back to debates staged largely in the 1980s and 1990s.

* Department of Art History and PhD Program in Visual Studies, UC Irvine.

Third, Silbey's contribution is also striking for its placing into dialogue two notably different methods of argument: the one developed through historically established case law of the United States Supreme Court, and the other collected through conversation with living subjects. The first kind of knowledge is textual in orientation and its influence established by the institutional weight of the hierarchy of courts within U.S. law. This first is thus a vertically streamlined approach to interpretation characteristic of legal "precedent" in the most basic sense of the term. The second kind of knowledge has become textual only through Silbey's transcription of live conversations conducted through a more ethnographic approach. This second kind of knowledge is, in turn, more horizontally distributed in nature, seeking opinions and personal reflections among individuals who inhabit a shared field of practice characterized by similar institutional and technological possibilities and constraints.

Earlier, I had called these various strains of Silbey's argument "uncanny," which I mean only in a loosely Freudian sense, not as the return of the repressed so much as an eerie double to appear before the art historian reading her text. As I have outlined, while relatively little of commercial photography, postmodern methodologies, case law, or ethnography are major topics across the history of art in its present configuration, what is familiar are the overlapping and myriad temporalities brought forth by these aspects of Silbey's argument. Rather than being out of time or out of sync with the current practices of my own discipline, the multiplicity of timespans to arise throughout Silbey's argument align with a number of recent and influential art historical publications that attempt to theorize such folds of time as a methodology.

Many of these studies have been undertaken in the fields of early modern and pre-modern European art. Alexander Nagel and Christopher S. Wood make a case in *Anachronic Renaissance* for what they call the "plural temporality" of artworks, which in the fifteenth and sixteenth centuries in European culture, meant a competing or even recursive tension between one model of art's temporality as a timeless substitution for divine creation and another, more thoroughly presentist view of creation as the original act of an artist.¹ Amy Knight Powell's *Scenes from the Late Medieval Church and the Modern Museum* stages comparisons of Northern Renaissance artworks with those of the twentieth and twenty-first centuries according to an interpretive premise that

form has a way of detaching works of art from the people who worked them and from the time and place in which they were made, not by transcending history—that would be the metaphysical understanding of form as "idea" or "essence"—but rather by transgressing history, at least, our linear conception of it.²

1. ALEXANDER NAGEL & CHRISTOPHER S. WOOD, *ANACHRONIC RENAISSANCE* 7, 16–17 (2010).

2. AMY KNIGHT POWELL, *SCENES FROM THE LATE MEDIEVAL CHURCH AND THE MODERN MUSEUM* 9, 11 (2012).

Roland Betancourt takes up a related approach to what Powell calls the “promiscuity” of visual form in his forthcoming study titled *The Proleptic Image*, with the important revision that the bending of history imagined by what Betancourt terms “collisions” between different objects from different periods of time is not oriented toward imaginaries or institutional frameworks of the present day. Such collisions instead might take place between artworks of any temporal formation with those of another, with the result being a further unraveling of the unidirectional assumptions of linear time.³ An additional strain of this recent art historical theory has further sought to characterize the condition of “contemporaneity” as existing among multiple trajectories of time across the globe. Such studies seek to characterize the simultaneity of forms of cultural production arising from discrepant relations to advanced industrialization, digital automation, and the postcolonial economics of globalization.⁴

In light of this body of scholarship, we might return to the three art historically uncanny aspects of Silbey’s article: commercial photography, theoretical postmodernism, and the dialogue of case law and ethnography. Regarding the photographers, many of their statements assume a singularity and timelessness to the criteria of photographic quality. Such criteria of judgment, however, exists as but one among many ways to value photographic production that might also encompass camera-less photographs that manipulate the chemical basis of photography, conceptualist approaches noted previously that devalue conventional photographic skill, or even more recent images made entirely using digital data that are printed on photographic paper, rather than using light “captured” by either analog or digital photographic technologies. This is to say that the criteria invoked by Silbey’s commercial photographers is relative. But even beyond this point, such a set of criteria was itself copied from another field of practice in the nineteenth century, following the invention of photography.

At the moment when new technologies arise, after all, their initial uses tend to adhere to pre-existing frameworks. In our lifetime, we might think of the digitization of music on CDs, a shiny plastic version of vinyl records, before the arrival of the iPod. In the history of photography, nineteenth-century practitioners such as Napoleon Sarony, Henry Peach Robinson, and Oscar Rejlander initially used cameras to compose portraits that borrowed from the paradigm of the painter’s

3. Roland Betancourt, *The Proleptic Image* (unpublished manuscript) (on file with author).

4. See KEITH MOXEY, *VISUAL TIME: THE IMAGE IN HISTORY* (2013); Hal Foster et al., *Questionnaire on “The Contemporary,”* 130 *OCTOBER* 3 (2009). It should further be noted that outside of Anglo-American Art History, the work of Georges Didi-Huberman has been especially fundamental in establishing more experimental notions of anachronism. See GEORGES DIDI-HUBERMAN, *DEVANT LE TEMPS: HISTOIRE DE L’ART ET ANACHROMISME DES IMAGES* (2000); GEORGES DIDI-HUBERMAN, *L’IMAGE SURVIVANTE: HISTOIRE DE L’ART ET TEMPS DES EANTÔMES SELON ABY WARBURG* (2002); GEORGES DIDI-HUBERMAN, *CONFRONTING IMAGES: QUESTIONING THE ENDS OF A CERTAIN HISTORY OF ART* (John Goodman trans., 2005); Georges Didi-Huberman, *Before the Image, Before Time: The Sovereignty of Anachronism*, in *COMPELLING VISUALITY: THE WORK OF ART IN AND OUT OF HISTORY* 31 (Claire J. Farago & Robert Zwijnenberg eds., 2003).

studio—oil paint on canvas or panel being the recording technology of naturalistic depiction that had predominated in the centuries immediately prior to that of photography. Regarding the contemporary commercial photographers interviewed by Silbey, many of whom express concern about a loss of income under the market pressures of new digital practices and articulate the necessity of maintaining their studios and preferred way of making photographs, one might wonder whether the disappearance of such artistic capital has been looming far before the advent of digital photography. To follow this line of thought, the protection of pre-shutter labor activities under copyright law might be seen to have shielded an already obsolete institutional practice.

To draw a comparison, we might think of this present situation as akin to protecting the labor of plaster preparers in the fifteenth and sixteenth centuries to maintain the business of fresco painting, with those practitioners arguing that a labor force of oil painters producing artworks both more portable and less time-consuming was placing at risk the very viability of quality painting (understood as meaning: fresco painting). That commercial photographers now claim a similar line of thought with respect to the emergence of a labor force working with quicker and more distributable digital techniques, or that unlicensed copies of their work repurposed on digital platforms threaten the viability of quality photography (understood as meaning: made via the conventions of studio photography), fails to register the folding of time between these claims and technological innovations of the art historical past. In this instance, the problems raised by the advent of digital photography are not new problems, per se, but rather the recurrence of ongoing and cyclical issues encountered when technological innovation intersects with representational convention.

In similar fashion, the generational gap—or seeming “time warp,” as I call it above—between postmodernism’s moment in the humanities and the present day does not leave the importance of its arguments in the past. One of the shared insights within the art historical body of literature on myriad temporalities is the idea that no object or text is ever truly out of time or without impact in the time of another object or text. While the law must remain oriented to the present—as new situations, claims, complaints, and cases demand just evaluation under its jurisdiction—it too has a folded relation to the past. As Silbey convincingly demonstrates, the differing issues among *Burrows-Giles Lithographic Co. v. Sarony*,⁵ *Bleistein v. Donaldson Lithographic Co.*,⁶ and *Feist Publications, Inc. v. Rural Telephone Service, Co.*⁷ all nonetheless adhere to present-day concerns, not in a straight line of development, but more through loops and returns to understandings of creativity and originality to have arisen since the late nineteenth century. The fact that legal theory would also incorporate humanist discourses of the 1990s appears consistent

5. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

6. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

7. *Feist Publ'ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340 (1991).

with its inclination to revisit disputes of the 1880s or 1900s to address the changing face of copyright adjudication in the present day.

The final issue—that counterpoising the interpretive approaches of Supreme Court case law with that of interviewing individual subjects—is equally resonant for thinking about the concerns shared between the fields of law and the humanities, in that it foregrounds the very issue of how different temporal paradigms of data and interpretation can and should be juxtaposed against one another. For the outside observer, the practice of the law in the court system of the United States seems to conflate historical and ahistorical assumptions: the historical being the precedent of established case law ranging over the two-hundred-plus-year history of the United States as a sovereign nation, and the ahistorical being a reliance on deductive logic and rationality that exists outside of the ideological conditions of the individual performing said reasoning. The strength of Silbey’s paper for such readers strikes me as lying precisely at this intersection, in staging a conscious dialogue between historical time and present time, that is, of temporal vantages that otherwise unconsciously underlie legal argument. This is a different set of issues and perspectives than those historians of art tend to use in addressing the subject of contemporary photography, but it is a methodological orientation that is strangely familiar.

